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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1958

HORACE INGRAM, L. E. SMITH, MARY PARKS LAW AND RUFUS JENKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 3379–3386; Pet. App. 17–24) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1958 (R. 3387; Pet. App. 16). A petition for rehearing was denied on September 23, 1958 (R. 3388–3392). The petition for a writ of certiorari was filed on October 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

tion 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U. S. C. (Supp. V) 7272, 68A Stat. 866, provides:

Penalty for failure to register.

(a) *In general.*

Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

18 U. S. C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

Petitioners, together with 27 others, were charged in count 1 (R. 1–14) with a conspiracy to evade and defeat the payment of the wagering taxes on lottery "numbers" operations, imposed by 26 U. S. C. (Supp. V) 4401 and 4411, in violation of 26 U. S. C. (Supp. V) 7203 (*supra,* pp. 2, 3). Eighteen of these defendants, including the four petitioners, were charged in count 2 (R. 14) with the substantive offense of accepting wagers without paying the special tax imposed by 26 U. S. C. (Supp. V) 4411, in violation of 26 U. S. C. (Supp. V) 7203 (*supra,* pp. 3, 4); and in count 3 (R. 14–15) with engaging in the business of accepting wagers without registering as required by 26 U. S. C. (Supp. V) 4412, in violation of 26 U. S. C. (Supp. V) 7272 (*supra,* pp. 3, 4).

Petitioners Ingram and Jenkins were found guilty on all three counts, and were sentenced to imprisonment for five years on the conspiracy count, imprisonment for one year under count 2, and a $25.00 fine under count 3 (R. 3350, 3354, 3358, 3362). Petitioners Smith and Law were found guilty only on the conspiracy count, and each was sentenced to imprisonment for three years (R. 3352, 3353, 3360, 3361). On their appeals, together with those of a number of other defendants (R. 3368–3371), the convictions were affirmed (R. 3387; Pet. App. 16).

The record is voluminous, but pertinent evidence adduced at the trial may be briefly summarized as follows:

Internal Revenue agents, Georgia state investigators, and a newspaper reporter for the "Atlanta

Constitution" had been conducting surveillance of the four petitioners and other defendants in Atlanta, Georgia, during the period between 1954 and 1957. This surveillance showed that petitioners and others, during the hours when lottery headquarters are customarily visited, picked each other up in automobiles, and took circuitous routes in driving outside Atlanta, speeding away to "shake" the agents following them (R. 212, 213, 216, 220–224, 228–229, 235, 237, 253, 261–262, 289, 290, 291, 307, 313, 316, 318, 323, 694, 743–744, 746, 747, 2542–2563, 1317–1322).

Co-conspirator Allen testified that in 1955 he worked as a pick-up man for Ingram at $40 per week, and that he would pick up lottery tickets and place them in a "stash" which was changed from time to time (R. 2246–2249). Sometimes Allen would deliver lottery tickets to Ingram, Law, and Smith outside the city. The meeting place would be changed each month (R. 2249–2250, 2256–2258).

In the fall of 1955, Ingram told state investigators Little and Carter that there were others in the lottery business in Atlanta besides him, and asked why they did not "try to catch some other lottery men". Ingram stated that the investigators were not going to catch him around any lottery; that the investigators following his men had caused him to "change cars as many as five times in one day"; and that others were taking away his business, which had been reduced to $3,500 per day (R. 1024, 1027–1028).

On December 1, 1955, defendant Turner was apprehended in the act of transporting a number of sacks of lottery tickets in a hidden compartment of a red

Ford truck (R. 757–761, 2317–2322). While this truck was stopped, Ingram and Smith drove by and were pursued, but not caught, by a police officer (R. 759–760, 2319–2320). On December 10, 1955, Turner pleaded guilty to a state charge of lottery in DeKalb County, Georgia, and his $1,000 fine and attorney's fee were paid by petitioner Smith (R. 1762–1764). Turner informed investigator Carter that petitioner Ingram would pay for his bond and fine for the lottery offense (R. 774, 776).

The Ford truck used by Turner, then painted green, was driven by defendant McDowell when he was stopped by investigator Carter on June 22, 1955 (R. 757, 776–777, 891). During 1955, for a time, this truck was painted a third color (black) and was regularly used by co-conspirator Allen and defendant Turner (R. 2254–2256, 2384). Ingram paid for the servicing of this truck and several other cars, especially adjusted for faster acceleration, at a service station operated by defendant Ellington (R. 2380, 2383–2384, 2387–2389).

On December 24, 1955, police sergeant Slate told officers Clark and Appling that Ingram said that they should come over to his garage to get a ham and a fifth of whiskey. Slate said that Ingram was "good to policemen", and that all the "Big Boys" were at Ingram's garage, with "about forty-five down there today" (R. 1865–1866, 2133–2135). Police officers carrying presents of ham and whiskey were seen leaving Ingram's garage in December 1955 (R. 1669–1670, 2265).

Witness Rutherford testified that during 1956, for a period of about four months, he placed lottery bets several times a week with defendant John Elmer Ingram. In August 1956, this defendant asked Rutherford to plead the Fifth Amendment and not testify against him (R. 2230–2232).

In the summer of 1956, petitioner Horace Ingram spoke to officer Appling about how defendants Turner and Williams assisted in his lottery operations. Ingram compared his lottery business with that of another Atlanta lottery operator (R. 2009, 2110, 2120–2124). In the fall of 1956, Ingram, angered by the fact that his son had been given a speeding ticket, offered to bet police officers Clark and Appling $1,000 that they would not remain on their beat after that week. Ingram stated, "I've got more power and more politics than either one of you". A few days later the officers were transferred to a beat in a different part of the city (R. 1847–1849, 1851, 2006–2007).

On September 20, 1956, petitioners Smith and Law, using fictitious names, together with three other defendants, were apprehended with equipment and paraphernalia in a raid at a lottery headquarters in Forsyth County, Georgia, after which they entered pleas of guilty to the accusations under state lottery charges (R. 1090–1091, 1094–1097, 1122, 1169, 1195–1198, 1201, 1222).

In the early part of 1957, surveillance was centered around Ingram's garage, a headquarters of the lottery. The window to the office of the garage was made of a special glass which "permits vision from the inside

out but prohibits vision from the outside into the building", and the doors were equipped with double locks (R. 30–31). Motion pictures were taken of the activities around the garage and showed frequent visits by police officers in patrol cars (R. 694, 729, 732–733, 737).

On January 9, 1957 and March 25, 1957, petitioner Ingram was observed at the garage on three occasions, either handing money to a policeman or dropping money inside a police patrol car (R. 1177–1178, 1322–1323, 1587–1589, 1661–1663). On February 28, 1957, Ingram arrived at the garage with stacks of currency about one foot high (R. 1183, 1184).

On February 1, 1957, petitioner Jenkins and Ingram were seen counting two large rolls of bills in front of the garage (R. 1181, 1345). Jenkins was at the garage regularly, going in and out several times a day. He drove various persons, including defendant Hill, to and from the garage (R. 822–823, 1344, 1346–1347).

During this period, petitioner Smith was also observed going to and from the garage on regular occasions (R. 806–810). On March 8, 1957, Smith arrived at the garage with a covered box which he was carrying (R. 1334–1335). Several days later, he was observed carrying an adding machine from the garage office to an automobile (R. 1335–1336). On March 25, 1957, Smith was seen giving several bills to a Negro at the garage. Later that night, Smith took two heavy cloth sacks out of the office, put them in the trunk of an automobile, and drove off (R. 1337–1338).

The surveillance of the lottery operations culminated in a raid on Ingram's garage at 1492 Howell Mill Road in Atlanta on March 27, 1957 under a federal search warrant (R. 28–29, 193). The sum of $8,934.00 was seized from defendant Christian and $784.45 from petitioner Ingram (R. 144, 146). Also seized in the raid and introduced in evidence were a number of fictitious automobile registrations and items customarily used in lottery operations, including scratch pads, paper sacks, lottery ribbons, a lottery banker's record, coin wrappers, rubber bands, gem clips, card tables, and radios. Jenkins arrived later and was also arrested (R. 163, 164, 160–161, 71, 114, 208–211, 165–166, 172–173, 166–168, 156, 186, 823).

The Internal Revenue records for the years 1954 through 1957 inclusive showed that none of the defendants or co-conspirators had purchased a federal wagering tax stamp, had registered with the Director of Internal Revenue as persons engaged in the wagering business, or had paid a federal excise tax on wagers (R. 1991–1993, 2000–2003).

ARGUMENT

The various functions of the banker, writer and pick-up man in the operation of a numbers lottery, such as that here involved, are set forth in *United States* v. *Calamaro,* 354 U. S. 351, 353. In the court below, it was conceded that there was evidence tending to prove that petitioner Ingram was a banker (Pet. App. 19). The record clearly supports this conclusion, and Ingram does not claim here that he was

not a banker. The court below observed that the conviction of petitioner Jenkins on the two substantive counts indicated that the jury regarded him as a principal in the enterprise (Pet. App. 19). The evidence (*supra*, pp. 9, 10) indicates that he had a proprietary interest in the venture. Petitioners Smith and Law can be classified as headquarters personnel. Certain defendants who are not petitioners here (*e. g.*, Richard Lee Turner and John Hill, Jr.) were pick-up men. Under the *Calamaro* case, *supra*, pick-up men and personnel other than bankers, writers, and those having a proprietary interest in the lottery, are not considered as engaged in receiving wagers and are not subject to the annual $50 special occupational tax. The contentions of petitioners go only to the propriety of the conviction of those persons who were not themselves liable for the tax.

1. There is no merit to petitioners' contention that the evidence against the pick-up men and headquarters personnel showed only a conspiracy to violate the state lottery laws, as distinguished from a conspiracy to evade and defeat the payment of federal wagering taxes (Pet. 8–9, 14). The judge gave a comprehensive charge on the issue, to which no exceptions were taken. In part, he said:

> * * * The United States is not charging the defendants with the crime or misdemeanor of operating a lottery, and the jury will not concern itself as to whether or not there was a conspiracy to violate the laws of Georgia prohibiting the operation of a lottery, it being the province of the courts of this state, and its

officers, to enforce that law and to prevent its violation. The violation of a law, if there has been one in this case, and with which you are concerned, is the agreeing and conspiring among the defendants by affirmative, positive actions, to willfully and intentionally aid and assist any writer, if there was any, or any banker, if there was any, or any person having a proprietary interest in the operation of the lottery, to violate the law by defeating or evading the tax (R. 3321–3322).

* * * * *

Now I instruct you that where the evidence of the Government shows certain conduct on the part of the defendants, or any of them, in the handling of affairs, the likely effect of which would be to mislead or conceal, then it will be your duty to look to the evidence and determine the motive for such conduct, and if you should find that the motive for such conduct was for the sole purpose of concealing a lottery operation, then such conduct would not amount to acts of commission to defeat or evade the tax; however, if the tax evasion motive plays any part in such conduct the offense may be made out even though the conduct may serve other purposes, such as the concealment of the lottery from State officers, if you find that a lottery was being conducted (R. 3326–3327, 3344–3345).

Other parts of the charge required, as a prerequisite to conviction for conspiracy, the finding of an illegal agreement, express or implied, between the various defendants to evade and defeat the federal tax laws (R. 3305–3306, 3323, 3331).

Petitioners were obviously intent upon doing everything they could to keep the lottery in operation and to avoid its detection. They were concerned with avoiding detection by persons other than the local police (whom they apparently thought they could handle). The jury had the right to infer that this desire to conceal operations from all outside authorities embraced the federal tax authorities as well as state officers. No numbers business as large as this one would have been unaware of the federal tax due in 1955 and 1956, and the efforts which petitioners made to conceal their operations from authorities, federal and state, clearly amounted to an attempt to evade and defeat payment of the federal taxes under the rule of *Spies* v. *United States*, 317 U. S. 492. The Court of Appeals which affirmed this conviction has shown a sharp awareness of the distinction between mere failure to pay the tax and evasion. See *Clay* v. *United States*, 218 F. 2d 483 (C. A. 5). It properly found that the acts here went far beyond mere failure to pay.

2. There is no merit to the claim that, as to those not themselves liable for the tax, the proof failed to show that they knew the tax had not been paid. The two petitioners in that category were persons working at headquarters, at the very heart of the operation. The jury had strong reason to infer that they knew that the secrecy of their operations meant concealment from federal authorities, as well as state officials, and that the venture in which they were engaged contemplated non-payment of federal taxes.

3. One incapable of committing a federal offense may nevertheless be guilty of conspiracy to commit such offense. *Gebardi* v. *United States*, 287 U. S. 112. Here, those petitioners not themselves liable for the tax were, as noted above, headquarters personnel engaged in the active conduct of the lottery. They were actively assisting their principals in violating the law and thus properly found guilty of conspiracy to violate the law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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